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IN THE
COURT OF APPEALS OF INDIANA

ERIC S. JETT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 41A01-0707-CR-330
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE JOHNSON SUPERIOR COURT NO. 2
The Honorable Cynthia S. Emkes, Judge
Cause No. 41D02-0505-FB-7

May 20, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Eric Jett (Jett), appeals his conviction and sentence for battery resulting in serious bodily injury, as a Class B felony, Ind. Code § 35-42-2-1.

We affirm but remand with instructions.

ISSUES

Jett presents three issues on appeal, which we restate as the following two:

(1) Whether the trial court abused its discretion by excluding certain testimony; and

(2) Whether his sentence is inappropriate.

In addition, we raise one issue *sua sponte*:

(3) Whether the trial court erred in sentencing Jett upon his admission to being a habitual offender.

FACTS AND PROCEDURAL HISTORY

In early May of 2005, Jett was living in an apartment in Franklin, Indiana, with his girlfriend, Angela Childers (Childers), their three-month-old son B.J., and Childers' ten-year-old son T.B. On the morning of May 10, 2005, Childers left the apartment at approximately 7:30 a.m. to drive T.B. to his bus stop. While Childers was gone, a neighbor heard screaming and crying from the apartment. The neighbor had previously heard B.J. crying, but that morning was different, "kind of like wailing . . . severe crying." (May 15 Transcript p. 65). The neighbor also heard Jett "hollering at the baby, telling the baby to shut up." (May 15 Tr. p. 66). Jett was "cussing at the baby for quite a long time[.]" (May 15 Tr. p. 66). However,

when Childers returned home, Jett was holding B.J. in a rocking chair, and B.J. was "crying like usual . . . just a little fussy, nothing major." (May 15 Tr. p. 112). Nonetheless, Jett eventually suggested that they take B.J. to the hospital, but Childers said they should not do so because it was ordinary crying and the hospital would "laugh at us and send us back home[.]" (May 15 Tr. p. 114).

B.J.'s crying intensified throughout the morning, and, at some point, Jett took him into a bedroom in hopes of quieting him down. Jett emerged after five minutes, and Childers observed that B.J. was somewhat less fussy. Jett again sat in the rocking chair with B.J., but, a few minutes later, he called Childers to look at the baby. Childers noticed that B.J.'s eyes were rolling back into his head. Jett and Childers took no action at that time, and Jett put B.J. in his crib after he fell asleep.

After five more minutes, Childers checked on B.J. and observed that he was moaning and that his eyes were again rolled back into his head. When she lifted B.J., his body was stiff. However, when Childers told Jett that she wanted to take B.J. to the hospital, Jett said, "No, f*** you, you wanted to be a b**** when I wanted to take him, so no, we're not taking him." (May 15 Tr. p. 119). Despite Jett's protest, Childers decided to take B.J. to the hospital. As Childers dressed B.J., he was screaming and so stiff that she struggled to get his clothes on. When Childers placed B.J. into the car, he quit screaming and went limp. Thinking that B.J. had died, Childers screamed for someone to call 911. Medical personnel arrived and asked Jett about how and when B.J.'s symptoms began, but he repeatedly stated

that B.J. suffered from gastroesophageal reflux disease and that he had experienced problems since birth.

After tests at Johnson Memorial Hospital revealed brain injuries, B.J. was sent to Riley Children's Hospital (Riley) in Indianapolis. At Riley, doctors twice drained fluid from B.J.'s skull and then implanted a shunt to prevent further fluid build-up. B.J.'s surgeon anticipates that the shunt could be removed around the time B.J. turns two years old. Pediatricians who reviewed B.J.'s case suggested that his injuries were caused by "very high energy forces", (May 15 Tr. p. 214), such as a high speed car accident, a television falling on his head, shaking, or a fall from a high distance. Dr. Mary Edwards-Brown (Dr. Edwards-Brown) observed that B.J. had suffered brain atrophy and that he would likely have long-term learning disabilities. (State's Exhibit 28).

Police questioned Jett and Childers at Riley, and Jett denied hurting B.J. Later that night, Jett gave a second statement in which he said he bumped B.J.'s head on a doorframe and dropped him to the floor. Police arrested Jett the next day. Jett then made a third statement in which he admitted that he had become frustrated with B.J. and "slammed" him onto a bed. (May 16 Tr. pp. 81-82). Jett demonstrated his actions to the officer using a doll. Jett then said that he was sorry for hurting his son and asked the investigating officer for a hug. Pediatricians who reviewed B.J.'s injuries confirmed that they were consistent with being thrown onto a bed.

On May 16, 2005, the State filed an Information charging Jett with three counts of battery resulting in serious bodily injury to B.J., a Class B felony, I.C. § 35-42-2-1(a)(4).

Count I was based on a battery alleged to have taken place between February 22, 2005 and March 24, 2005. Count II was based on a battery alleged to have taken place between March 24, 2005 and May 9, 2005. Count III was based on the May 10th incident. On March 3, 2006, the State added an allegation that Jett is a habitual offender. While Jett was incarcerated awaiting trial, he told his cellmate that he had thrown his baby on a mattress because he was mad at Childers for leaving him alone with the baby.

A jury trial commenced on April 18, 2006. The jury acquitted Jett of Counts I and II but became hung on Count III. A second trial on Count III began on October 3, 2006, but also ended with a hung jury. A third trial began on May 14, 2007, and the jury found Jett guilty of Count III. Jett then admitted to being a habitual offender. On May 31, 2007, the trial court imposed a sentence of 7300 days (twenty years) on Count III, with 730 days (two years) suspended to probation. The trial court also sentenced Jett to 7300 days with 730 days suspended to probation on the habitual offender count. The trial court ordered the sentences "to run consecutive to each other," (Appellant's App. pp. 13, 19), resulting in an executed sentence of thirty-six years to be followed by four years of probation.

Jett now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Admissibility of Evidence*

Jett argues that the trial court abused its discretion by excluding certain testimony that he says shows that Childers, not he, injured B.J. A trial court has broad discretion in ruling on the admissibility of evidence. *Fentress v. State*, 863 N.E.2d 420, 422-23 (Ind. Ct. App.

2007). As such, we will reverse such a ruling only when the trial court abuses its discretion. *Id*. at 423. An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. *Id*.

A. *Cindy Colvin and Sarah Jett*

Jett first contends that the trial court abused its discretion by excluding certain testimony by Cindy Colvin (Colvin) and Jett's mother, Sarah Jett. Jett sought to introduce testimony by Colvin regarding a conversation she had with Childers the night before B.J. was taken to the hospital. During an offer of proof that was made during the second trial and incorporated into the third trial, the following exchange transpired between defense counsel and Colvin:

> Q: Did you have a conversation with [Childers]?
>
> A: Well just her little boy [T.B.] was out there and I was just telling her that she had two little boys, cause that's the first time I'd ever seen him. Then she proceeded to tell me that she was going to "F"ing kill him, I didn't say anything, then she proceeded to tell me why because she was sick all day, she said, and he kept aggravating her, you know, was "mommy you feel bad" or "you feel better", "can I get you something to eat", you know in that area. And then . .
>
> * * * *
>
> Q: What was her body language, her demeanor, her facial expressions during that time?
>
> A: Mean, mad, just you know, stomping around, huffy, you know.

(May 17 Tr. pp. 43-44).

Jett also sought to introduce testimony by Sarah Jett regarding a conversation she had with Childers "a few weeks" before B.J. was injured. (Appellant's Br. p. 11). During the

same offer of proof, the following colloquy took place between defense counsel and Sarah Jett:

> Q: In that last week of April, 2005, what did [Childers] say to you that caused you to be concerned about [B.J.]?
>
> A: She told me that he was an accident, that she did not want him and that he was all [Jett's] idea.
>
> * * * *
>
> Q: And what did she say?
>
> A: She said "Sarah . .", she broke down and started crying, and she said "Please will you come and get [B.J.] because I cannot stomach to look at him because he looks just like [Jett]."

(May 17 Tr. pp. 48-49).

The trial court found, in part, that this testimony was irrelevant under Indiana Evidence Rule 401.[1] Indiana Evidence Rule 401 provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Evidence which tends to show that someone else committed the crime logically makes it less probable that the defendant committed the crime, and thus meets the definition

[1] The trial court also excluded the evidence based on Indiana Evidence Rule 404(b). Because we conclude that the trial court properly excluded the evidence under Rule 401, we need not address the parties' arguments under Rule 404(b).

of relevance in Rule 401." *Joyner v. State*, 678 N.E.2d 386, 389 (Ind. 1997), *reh'g denied*. Jett argues that the trial court abused its discretion by excluding the above testimony on relevancy grounds because it tends to show that Childers committed the crime. We disagree.

Trial courts have wide latitude in determining the relevancy of evidence. *Williams v. State*, 749 N.E.2d 1139, 1142 (Ind. 2001). Here, Colvin's testimony tended to show nothing more than that Childers was upset with her older son T.B., not B.J., the night before B.J. was injured. Furthermore, with regard to Sarah Jett's testimony, remoteness in time is a valid consideration in determining relevance. *Fisher v. State*, 641 N.E.2d 105, 109 (Ind. Ct. App. 1994). Childers' alleged comments show only that she was upset with B.J. at some point a few weeks before B.J.'s injuries. We cannot say that the trial court abused its broad discretion in determining that the above testimony was irrelevant to the question of whether Childers, rather than Jett, injured B.J. on the day in question.

B. *Childers*

Jett also contends that the trial court abused its discretion by excluding certain testimony by Childers herself.[2] Specifically, Jett points to the following exchange between defense counsel and Childers during an offer of proof made during the second trial:

> Q: When [B.J.] was released from the hospital [Jett] had already been arrested?
>
> A: Correct.

---

[2] In part, Jett asserts that the trial court abused its discretion by refusing to allow Childers to testify regarding her alleged comments about T.B. and B.J., as related by Colvin and Sarah Jett. However, we concluded above that those comments were irrelevant to this case, and we need not address the issue again simply because we are now dealing with Childers' testimony.

Q: Correct? [Jett] was in jail?

A: Yes.

Q: He was not at home?

A: No.

Q: You had [sic] the [Department] of Child Services would not release [B.J.] to you?

A: Correct.

(May 15 Tr. pp. 149-50).

Jett apparently believes that the fact that the Department of Child Services would not turn B.J. over to Childers upon his release from the hospital even though Jett was locked up tends to show that Childers was the one who battered B.J. The State counters that Childers' testimony was irrelevant with regard to whether Childers battered B.J. We agree with the State.

We first note that while the trial court ultimately excluded this testimony based on Indiana Rule of Evidence 404, it did express doubts with regard to the relevancy of this testimony.[3] Moreover, "appellate review of the exclusion of evidence is not limited to the grounds stated at trial, but rather the ruling will be upheld if supported by any valid basis." *Lashbrook v. State*, 762 N.E.2d 756, 758 (Ind. 2002). Here, we concur in the trial court's doubts as to the relevancy of Childers' testimony. Jett fails to direct us to any explanation of why the Department of Child Services refused to release B.J. to Childers, so Jett's suggestion

[3] "Well first of all I had a little trouble even with the relevancy issue to be honest with you, I think that's, that's fairly (INAUDIBLE) if, if anything." (May 15 Tr. p. 159).

that the Department did so because it believed that Childers, not Jett, battered B.J. is pure speculation. In other words, because there are many reasons why the Department of Child Services might have wanted to maintain control over B.J. for a period of time, the fact that it did so is not relevant to whether Childers battered B.J. The trial court did not abuse its discretion in excluding this testimony.

II. *Sentencing*

Next, Jett contends that his sentence is inappropriate under Indiana Appellate Rule 7(B). Appellate Rule 7(B) permits us to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *See* Ind. Appellate Rule 7(B); *see also Childress v. State*, 848 N.E.2d 1073, 1079 (Ind. 2006). The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress*, 848 N.E.2d at 1080. Jett has not carried this burden.

The statutory sentencing range for a Class B felony is six to twenty years, with the advisory sentence being ten years. *See* I.C. § 35-50-2-5. In addition, on the habitual offender finding, the trial court was required to impose an additional fixed term of between ten and thirty years. *See* I.C. § 35-50-2-8(f) ("The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the advisory sentence for the underlying offense [*i.e.*, ten years] nor more than three (3) times the advisory sentence for the underlying offense [*i.e.*, thirty years]."). The trial court imposed the maximum sentence of twenty years on the Class B felony, with two years suspended to probation. However, the

trial court did not impose the maximum sentence of thirty years on the habitual offender finding, instead only sentencing Jett to twenty years, with two years suspended to probation. The trial court then ordered the sentences to run consecutive to each other. Therefore, while Jett faced a maximum possible sentence of fifty years, his actual sentence consists of thirty-six years executed followed by four years of probation.

Regarding the nature of his offense, Jett notes that B.J.'s treating physician anticipates that the shunt in B.J.'s head could be removed around the time he turns two years old. Jett maintains an optimistic view of this fact. A more pessimistic view is that an infant has to have a shunt in his head for twenty-one of the first twenty-four months of his life. Jett also argues that the high-end sentence that he received should be reserved for "batteries that severely injure the child for the rest of their life." (Appellant's Br. p. 17). But Dr. Edwards-Brown concluded that B.J.'s injuries resulted in brain atrophy and that he is likely to have long-lasting learning problems due to these injuries. Such injuries seem fairly serious to us. Next, Jett asserts that B.J.'s young age is not a valid sentencing consideration since his age was the factor that elevated this crime from a Class C felony to a Class B felony. *Compare* I.C. § 35-42-2-1(a)(3) (defining battery as a Class C felony if it results in serious bodily injury) *with* I.C. § 35-42-2-1(a)(4) (defining battery as a Class B felony if it results in serious bodily injury to a person less than fourteen (14) years of age and is committed by a person at least eighteen (18) years of age). However, even where the victim's age is an element of the crime, it is also a valid aggravating circumstance when the victim is of particularly tender years. *See Kien v. State*, 782 N.E.2d 398, 414 (Ind. Ct. App. 2003), *reh'g denied*, *trans.*

denied. Victims do not get much younger than three-month-old B.J. We also note that Jett objected to taking B.J. to the hospital as his symptoms worsened and that, as the trial court recognized, he failed to give a full account of his actions at the time when it would have aided medical personnel.

Furthermore, nothing about Jett's character leads us to conclude that his sentence is inappropriate. He has two prior felony convictions, one for burglary as a Class C felony and one for resisting law enforcement as a Class D felony. In addition, he has five misdemeanor convictions, one for battery (on Childers) and four for driving while suspended, and a juvenile adjudication for grand theft auto. Finally, Jett has violated the conditions of his probation on two occasions in the past and was on probation again at the time of the instant offense. Jett's criminal history is lengthy and significant.[4] As the trial court noted, Jett's history indicates that he "lacks regard for the criminal justice system[.]" (May 31 Tr. p. 51). We cannot say that Jett's sentence is inappropriate.

III. *Habitual Offender Sentence*

Though Jett's total sentence is not inappropriate, we must address, *sua sponte*, two technical issues concerning the sentence arising from his habitual offender finding. First,

[4] We acknowledge that Jett's two felony convictions were the basis for Jett's habitual offender finding. There is a debate brewing in Indiana as to whether a trial court can rely upon the same felony convictions to both support a habitual offender finding and enhance the sentence for the underlying crime. *See Pedraza v. State*, 873 N.E.2d 1083 (Ind. Ct. App. 2007), *trans. granted*. However, where, as here, there are other convictions on the defendant's record in addition to the felonies supporting the habitual offender finding, we need not enter that debate. *See Waldon v. State*, 829 N.E.2d 168, 182 n.13 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied*.

"[a] habitual offender finding does not constitute a separate crime nor result in a separate sentence, but rather results in a sentence enhancement imposed upon the conviction of a subsequent felony." *Greer v. State*, 680 N.E.2d 526, 527 (Ind. 1997). Here, the fact that the trial court ordered the habitual offender sentence to run "consecutive" to the sentence on the underlying crime indicates that the court treated the habitual offender finding as a separate crime resulting in a separate sentence, rather than enhancing the sentence for the underlying crime. *See Reffett v. State*, 844 N.E.2d 1072, 1073-74 (Ind. Ct. App. 2006). Second, no part of a habitual offender enhancement can be suspended. *Howard v. State*, 873 N.E.2d 685, 690-91 (Ind. Ct. App. 2007); *but see Bauer v. State*, 875 N.E.2d 744, 747-50 (Ind. Ct. App. 2007), *trans. denied*. Here, the trial court suspended two of the twenty years it imposed for the habitual offender finding. We remand this cause to the trial court with instructions to impose a sentence of twenty years with four years suspended to probation on the battery conviction and to enhance the resulting sixteen-year executed sentence by twenty years based on the habitual offender finding, for a total executed sentence of thirty-six years followed by four years of probation.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion by excluding certain testimony and that the sentence imposed by the trial court is not inappropriate. However, the trial court erred in sentencing Jett on the habitual offender

finding. We therefore remand this cause to the trial court with instructions to adjust Jett's sentence in accordance with this opinion.

We affirm but remand with instructions.

BAKER, C.J., and ROBB, J., concur.